

## **REMARKS**

Claims 1, 3, 5, 7-8 and 20-25 are pending in the present application. Applicants respectfully request reconsideration of the application in view of the remarks made herein.

### **I. Rejections Under 35 U.S.C. § 103**

Claims 1, 3, 5, 7-8 and 20-25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over *Herz et al.* (US 2001/0014868) in view of *Freeny, Jr.* (US 6,076,071), in further view of *Kaminsky et al.* (US 2001/0047308). The Examiner essentially stated that the combined teachings of *Herz*, *Freeny* and *Kaminsky* teach or suggest all of the limitations of Claims 1, 3, 5, 7-8 and 20-25.

Claims 1 and 5 are the independent claims.

Claim 1 claims, *inter alia*, “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added). Claim 5 claims, *inter alia*, “wherein said dependency element determines the current retail charge, a lowest retail charge and a highest retail charge of said digital content independently from information corresponding to a current user” (emphasis added).

*Herz* teaches constructing a product offer tailored to an individual shopper in a way that maximizes profits (see paragraph [0004]). *Herz* does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” as claimed in

Claim 1 and essentially as claimed in Claim 5. The Examiner provides two reasons for the instant rejection. First, the Examiner states that Claims 1 and 5 recite “setting a lowest price and a highest price” (see page 2 of the Final Office Action). Respectfully, Applicants point out that Claims 1 and 5 essentially claim setting both a lower price and a higher price. That is, Claims 1 and 5 do not claim setting either a lowest price or a highest price; a highest price is always set. Second, the Examiner points to paragraph [0021] of the Specification as disclosing “a method for setting a price in accordance with the number of products sold can be employed to increase the profit provided by a product that is selling well and for providing a competitive price provided by a product that is not selling well.” The Examiner goes on to state that “these are all objectives of a demand curve and price pointing; please see the definition of Demand Curve in Wikipedia” (see page 3 of the Final Office Action). Respectfully, Applicants assert that the disclosure of paragraph [0021] of the Specification has no bearing on the fact that *Herz* fails to teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” as claimed in Claim 1 and essentially as claimed in Claim 5. As made clear in paragraph [0066] of the Specification, a highest price is set so that the price of a product will not rise above a specific value. This prevents the price of a popular product from increasing endlessly and becoming inappropriately high for that particular product. Applicants respectfully submit that the Examiner has failed to adequately explain how *Herz* teaches “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5, and thus, has

failed to establish a prima facie case of obviousness under 35 U.S.C. § 103(a). As stated previously, consider the following:

*Herz* clearly does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5. Consider that the object of the invention in *Herz* is to present a customer with a customized offer that will maximize profits. In Claims 1 and 5, the highest price acts as a ceiling to prevent the price of a product from increasing endlessly. Thus, *Herz* does not teach or suggest setting a highest price of a product essentially as claimed in Claims 1 and 5, since doing so would prevent offers corresponding to maximized profits from being made. Indeed, maximizing profits, as taught by *Herz*, clearly contradicts setting a highest price, as claimed in Claims 1 and 5.

In view of the foregoing, *Herz* fails to teach or suggest all of the limitations of Claims 1 and 5.

*Freeny* teaches a product pricing system using sales and inventory data, pricing and advertising data, and competition price data to change product prices (see col. 3, lines 49-55). *Freeny* does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5. Consider that *Freeny* teaches setting the price of a product to yield the maximum economic benefit for a store (see col. 4, lines 11-13); *Freeny* is silent on setting a highest price of a product. Indeed, the Examiner does not rely on *Freeny* in the rejection for this teaching. Therefore, *Freeny* fails to cure the deficiencies of *Herz*.

*Kaminsky* teaches a system for liquidating excess inventory via an interactive auction system (see paragraph [0019]). *Kaminsky* teaches a pricing strategy having a demand price and a buyer auction scheme (see Abstract), which operates per business rules determined by the particular merchant (see paragraph [0037]) relevant to an auction (i.e., a current price, an open order, demand price and bid price) (see paragraph [0049]). The rules in *Kaminsky* specify simple parameters for the auction; in any event, *Kaminsky* adjusts a current price only in relation to a bid price. Thus, *Kaminsky* has no need for determining a dependency element, and thus, does not teach or suggest using a dependency element to determine a highest price of a product, essentially as claimed in Claims 1 and 5. Further, setting a highest price of a product, as claimed in Claims 1 and 5, is clearly counterintuitive to a system using auctions, since the goal of an auction is to obtain the highest possible price. Thus, *Kaminsky* clearly does not teach setting a highest price acting as a ceiling, essentially as claimed in Claims 1 and 5. Indeed, the Examiner does not rely on *Kaminsky* in the rejection for this teaching. Thus, *Kaminsky* fails to cure the deficiencies of *Herz* and *Freeny*.

The combination of *Herz*, *Freeny* and *Kaminsky* teaches a product pricing system that matches a current consumer to a demand curve corresponding to a specific group of consumers, using sales and inventory data, pricing and advertising data, and competition price data to change product prices, and liquidating excess inventory via an interactive auction system. The combination does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5. Accordingly, the combination does not teach or suggest every limitation of Claims 1 and 5.

Further, Claim 1 claims, *inter alia*, “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added). Claim 5 claims, *inter alia*, “wherein said dependency element determines the current retail charge, a lowest retail charge and a highest retail charge of said digital content independently from information corresponding to a current user” (emphasis added).

*Herz* teaches a user-centric method for maximizing profits, wherein a specific consumer or consumer group is presented with products at prices that are most appropriate for that specific consumer or consumer group (see paragraph [0003]). *Herz* does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5. In the rejection, the Examiner construes determining the optimal price based on consumer demand, as taught by *Herz*, as teaching a dependency element determining the price of a product “independently from information corresponding to a current user” as claimed in Claim 1 and essentially as claimed in Claim 5 (see page 2 of the Final Office Action). Applicants respectfully disagree. Consider that *Herz* determines the optimal price of a product based on a consumer demand curve, and each consumer demand curve in *Herz* corresponds to a different group of consumers. *Herz* then teaches choosing one of these consumer demand curves based on the current consumer. Stated another way, *Herz* teaches using information corresponding to the current consumer to match the current consumer to a specific group of consumers and using a corresponding consumer demand curve to determine an optimal price for the current consumer. Indeed, determining an optimal

price in *Herz* is clearly dependent on utilizing information corresponding to the current consumer; that is, the object of the invention in *Herz* is to present the current consumer with a price deemed to be optimal for that specific consumer based on information corresponding to that specific consumer. For example, consider the following from paragraphs [0003-0005] of *Herz*:

- “It is a problem in the field of commercial sales to present consumers with products at prices that are most appropriate for the consumer” (emphasis added).
- “Different groups of consumers may have different demand curves, and hence different optimal prices” (emphasis added).
- “A vendor can increase profits by identifying many such groups of consumers and offering a distinct, profit-maximizing price to each” (emphasis added).
- “the vendor might offer a different price to each individual” (emphasis added).
- “A vendor can therefore increase profits, in general, by making different offers to different consumer groups – that is, by offering different products, or the same products differently advertised or priced” (emphasis added).
- “The system automatically constructs product offers tailored to individual shoppers, or types of shoppers, in a way that attempts to maximize the vendor’s profits” (emphasis added).
- “Largely by tracking the behavior of shoppers, the system accumulates extensive profiles of the shoppers and the offers that they consider...The system can then select, present, price, and promote goods and services in ways that are tailored to an individual consumer” (emphasis added).

- “Furthermore, when a product can be tailored to a particular shopper, a general technique or expert system can offer each consumer an appropriately customized product” (emphasis added).

In view of the foregoing, it is clear that the system and method taught by *Herz* depend on information corresponding to the current consumer in order to present the current consumer with an optimal price. Thus, the price of a product offered in *Herz* is always related to the current consumer. For further clarification of the distinction between Claims 1 and 5 and *Herz*, consider an example where the current user is a high school athletics director who purchases athletic equipment in bulk prior to the start of each school year. In Claims 1 and 5, the information corresponding to the current user, that is, the fact that the current user is an athletics director who purchases a high volume of athletic equipment every year, is not used in determining the price of potential purchases. Rather, the price is determined based on factors other than information corresponding to the current user – this is explicit from the limitations of Claims 1 and 5. Thus, in Claims 1 and 5, the fact that the current user is an athletics director who regularly purchases athletic equipment in bulk every year is not used to raise the price of potential purchases. The system of *Herz*, on the other hand, will identify the current consumer as someone who purchases large amounts of athletic equipment on a regular basis, and will use this information to offer a distinct, profit-maximizing price. Indeed, it is the object of the invention in *Herz* to profile the current consumer in order to present the consumer with an optimal price tailored to the individual consumer (see paragraphs [0003-0005]). Thus, while Claims 1 and 5 will offer athletic equipment to the athletics director at the same price as every other user, *Herz* will use information corresponding to the current consumer (e.g., the fact that the current consumer regularly purchases a high volume of athletic equipment) to offer the current consumer a higher price.

In view of the foregoing, *Herz* fails to teach or suggest all of the limitations of Claims 1 and 5.

*Freeny* teaches a product pricing system (see Abstract). *Freeny* does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” as claimed in Claim 1 and essentially as claimed in Claim 5. Consider that the product pricing system in *Freeny* uses sales and inventory data, pricing and advertising data, and competition price data to change product prices (see col. 3, lines 49-55). Nowhere does *Freeny* discuss a dependency element specified for a given product, let alone using a dependency element to determine the price of a product independently from information corresponding to a current user, essentially as claimed in Claims 1 and 5. Indeed, the Examiner does not rely on *Freeny* in the rejection for this teaching. Therefore, *Freeny* fails to cure the deficiencies of *Herz*.

*Kaminsky* teaches a system for liquidating excess inventory via an interactive auction system (see paragraph [0019]). *Kaminsky* teaches a pricing strategy having a demand price and a buyer auction scheme (see Abstract), which operates per business rules determined by the particular merchant (see paragraph [0037]) relevant to an auction (i.e., a current price, an open order, demand price and bid price) (see paragraph [0049]). The rules in *Kaminsky* specify simple parameters for the auction; in any event, *Kaminsky* adjusts a current price only in relation to a bid price. Thus, *Kaminsky* clearly uses information corresponding to the current user (e.g., the amount the current user is willing to bid on the product) in determining the price of the product. Indeed, the Examiner does not rely on *Kaminsky* in the rejection for this teaching. Thus, *Kaminsky* fails to cure the deficiencies of *Herz* and *Freeny*.



The combination of *Herz*, *Freeny* and *Kaminsky* teaches a product pricing system that matches a current consumer to a demand curve corresponding to a specific group of consumers, using sales and inventory data, pricing and advertising data, and competition price data to change product prices, and liquidating excess inventory via an interactive auction system. The combination does not teach or suggest “wherein said dependency element determines the current retail price, a lowest price and a highest price of said product independently from information corresponding to a current user” (emphasis added) as claimed in Claim 1 and essentially as claimed in Claim 5. Accordingly, the combination does not teach or suggest every limitation of Claims 1 and 5.

Therefore, for at least the above reasons, Claims 1 and 5 are believed to be patentable and non-obvious over the combination of *Herz*, *Freeny* and *Kaminsky*. Applicants respectfully request that inasmuch as Claims 3, 7-8 and 20-25 are dependent on Claims 1 and 5, and Claims 1 and 5 are patentable over the cited references, Claims 3, 7-8 and 20-25 are allowable as being dependent on patentable independent claims. Withdrawal of the instant rejection is respectfully requested.

**CONCLUSION**

In view of the foregoing, it is believed that all claims now pending patentability define the subject invention over the prior art of record and are in condition for allowance.

Early and favorable reconsideration of the case is respectfully requested.

Respectfully submitted,

Date: August 11, 2009

By: /Nathaniel T. Wallace/  
Nathaniel T. Wallace  
Reg. No. 48,909  
Attorney for Applicant(s)

F. Chau & Associates, LLC  
130 Woodbury Road  
Woodbury, New York 11797  
TEL: (516) 692-8888  
FAX: (516) 692-8889